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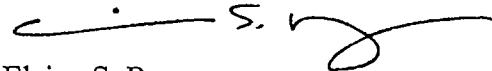
Petition of Chickahominy Pipeline, LLC, For a Declaratory Judgment
Case No. PUR-2021-00211

Dear Mr. Logan:

Please find enclosed for electronic filing in the above-referenced matter *Virginia Natural Gas, Inc. 's Response*.

Please do not hesitate to contact me if you have any questions in regard to this filing.

Best regards,



Elaine S. Ryan

enc.

cc: William H. Chambliss, Esq.
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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF)	
)	
CHICKAHOMINY PIPELINE, LLC)	Case No. PUR-2021-00211
)	
For a declaratory judgment)	

RESPONSE OF VIRGINIA NATURAL GAS, INC.

Virginia Natural Gas, Inc. ("VNG" or the "Company"), by counsel, hereby submits its Response to the Petition of Chickahominy Pipeline, LLC ("Chickahominy Pipeline") for a declaratory judgment (the "Petition") pursuant to Ordering Paragraph (8) of the Procedural Order issued by the State Corporation Commission of Virginia (the "Commission") on September 16, 2021 and the Hearing Examiner's Ruling issued on September 22, 2021, in the above-captioned proceeding.

I. BACKGROUND AND SUMMARY

VNG is a public service company organized and existing under the laws of the Commonwealth of Virginia that provides natural gas service to approximately 300,000 customers in its service territory in Virginia. This includes the communities of Norfolk, Virginia Beach, Chesapeake and Suffolk in southside Hampton Roads, and Hampton, Newport News, Poquoson, York, James City, Williamsburg, New Kent, Charles City, King William, and Hanover on the Peninsula.

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On May 8, 2018, the Commission issued a certificate of public convenience and necessity ("CPCN") to Chickahominy Power, LLC ("Chickahominy Power") to construct a 1,650 MW combined-cycle generating facility in Charles City County, Virginia ("Facility"). The Facility is located in VNG's certificated service territory. Chickahominy Pipeline is an entity formed to construct, own, and operate a pipeline to transport natural gas to the Facility ("Pipeline").

On September 3, 2021, Chickahominy Pipeline filed the instant Petition seeking a declaratory judgment from the Commission that:

pursuant to Virginia Code § 56-265.4:6 (B), it does not need Commission approval to construct the Pipeline because (a) Chickahominy will not serve two or more customers; and (b) Chickahominy is not a "public utility" that requires a certificate of public convenience and necessity to construct the Pipeline pursuant to Virginia Code § 56-265.2.¹

Chickahominy Pipeline further requested expedited consideration of its Petition by November 1, 2021. The Commission entered a procedural order on September 16, 2021. Among other things, the Order set September 24, 2021, as the deadline for other interested persons and Staff to file

¹ Petition at 2.

responsive pleadings to the Petition. On September 22, 2021, the Hearing Examiner issued a ruling extending this deadline until October 8, 2021.

II. RESPONSE

The Petition implicates the provisions and underlying policy of the Utility Facilities Act, Va. Code §§ 56-265.1 *et seq.* The Utility Facilities Act provides for exclusive service territories for public utilities in the Commonwealth, with limited exceptions.² Pursuant to Va. Code § 56-265.2, no public utility may “construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege.” Further, no public utility may provide public service in the Commonwealth without first obtaining a CPCN from the Commission pursuant to Va. Code § 56-265.3. Additionally, no public utility may obtain a CPCN in the service territory of another unless it can demonstrate that the service being provided by the certificated utility is inadequate and, after notice, the certificated utility has failed to remedy the inadequacy in a reasonable amount of time under Va. Code § 56-265.4.

The Commission has consistently held that these Code provisions together “provide for exclusive service territories that should be afforded significant protection.”³ In addition, the Supreme Court of Virginia has held that the exclusive right to serve is a vested and valuable

² Under Va. Code § 56-265.4:4, the Commission may grant certificates to competing telephone companies within the same service territory. Va. Code § 56-265.4:6 permits the furnishing of non-utility gas service under limited conditions.

³ *Petition of Prince George Electric Cooperative, For declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc., For declaratory judgment*, Case No. PUE-1996-00295, Order on Petitions for Declaratory Judgment, 1998 S.C.C. Ann. Rept. 344, 348 (June 25, 1998); *see also Petition of Kentucky Utilities Company d/b/a Old Dominion Power Company, For injunctive relief and/or declaratory judgment against Powell Valley Electric Cooperative*, Case No. PUE-1996-00303, Final Order, 1999 S.C.C. Ann. Rept. 368, 376 (Mar. 31, 1999).

property right entitled to the protection of the courts.⁴

The exclusive franchise reflects Virginia's policy against unnecessary duplication of facilities that are dedicated to the public interest. The Supreme Court of Virginia has found overlapping service areas and duplication of facilities not to be in the public interest: "For unnecessary duplication of . . . facilities, the public ultimately pays. 'Shoestring competition in the end hurts everybody.'"⁵ The Court has further stated:

The law on this subject is clear, specific and unequivocal, and . . . it was enacted by the General Assembly for the purpose of protecting the holders of existing certificates, and preventing undue and ruinous competition to them from those who sought to serve the same territory and thus deprive them of that which was theirs, rightfully acquired under a previously granted certificate.⁶

Chickahominy Pipeline's proposal to own and operate a pipeline to deliver natural gas to the Facility falls squarely within the definition of a "public utility" under the Utility Facilities Act and does not qualify for any of the enumerated statutory exemptions. As a "public utility," Chickahominy Pipeline cannot construct the pipeline without first obtaining a CPCN from the Commission under Va. Code § 56-265.2. Importantly, Va. Code § 56-265.2 grants no territorial service rights.⁷ Authority to own and operate utility facilities is governed by Va. Code §§ 56-265.3 and 56-265.4. However, Chickahominy Pipeline may not obtain a CPCN to own and operate a pipeline to deliver gas to Chickahominy Power because it would violate VNG's exclusive franchise to provide gas distribution service in its certificated service territory pursuant to Va. Code §§ 56-265.3 and 56-265.4.

⁴ *Town of Culpeper v. Virginia Electric and Power Company and Northern Piedmont Electric Cooperative, Inc.*, 215 Va. 189, 194, 207 S.E.2d 864, 868 (1974).

⁵ *Jessup v. Commonwealth*, 174 Va. 133, 138, (1939). See also *Petersburg, Hopewell and City Point Ry. Co. v. Commonwealth*, 152 Va. 193, 201 (1929).

⁶ *Virginia Stage Lines, Inc. v. Commonwealth*, 185 Va. 390, 38 S.E.2d (1946) (citing, with approval, dissenting opinion in SCC proceeding involving exclusive franchise for motor vehicle carriers under prior law).

⁷ *Application of Virginia Natural Gas, Inc. For a certificate of public convenience and necessity to build a pipeline*, Case No. PUE-1986-00065 ("VNG"), Final Order (Sep. 9, 1988), 1988 S.C.C. Ann. Rept. 257, 258.

The plain language, strong policy, and longstanding precedent of the Utility Facilities Act require a determination that the Pipeline would be subject to the Commission's jurisdiction and require a CPCN, but that issuing a CPCN would violate VNG's exclusive geographic service territory. VNG remains willing, as it has been, to provide a proposal for service to Chickahominy Power that is feasible, properly recovers the actual costs to serve this customer, and appropriately protects the utility and its other customers.

A. Chickahominy Pipeline constitutes a "public utility" under the Utility Facilities Act and requires a CPCN to construct the Pipeline.

The Utility Facilities Act regulates the facilities and service of "public utilities" and creates the statutory exclusive franchise to serve customers in a particular service territory. Va. Code § 56-265.1(b) defines "public utility" in relevant part as "any company that owns or operates facilities within the Commonwealth of Virginia . . . for the production, storage, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas or geothermal resources for sale for heat, light or power"

As proposed, Chickahominy Pipeline will construct, own, and operate an intrastate pipeline to distribute natural gas for consumption by the end user, Chickahominy Power, for use as fuel to operate an electric generating facility. The natural gas to be distributed on the Pipeline will be purchased by Chickahominy Power from a third-party natural gas supplier. Under the clear and unambiguous language of Va. Code § 56-265.1(b), Chickahominy Pipeline constitutes a "public utility" for purposes of the Utility Facilities Act and is subject to the Commission's jurisdiction.

Va. Code § 56-265.1(b) includes certain express exemptions to this definition, none of which are applicable here. For example, Va. Code § 56-265.1(b) (4) exempts sales or delivery service of natural or manufactured gas to fewer than 35 commercial or industrial customers for

use solely by such purchasing customers at facilities which are not located in a territory for which a certificate to provide gas service has been issued by the Commission, in accordance with the provisions of Va. Code § 56-265.4:5. In addition, Va. Code § 56-265.1(b) (11) exempts a company that provides “non-utility gas service” under Va. Code § 56-265.4:6. Chickahominy Pipeline admits that it is not providing “non-utility gas service.”⁸ Nor is Chickahominy Pipeline engaging in exempt gas delivery service, which is prohibited in the certificated service territory of a natural gas company, like VNG. In the absence of any applicable exemptions, Chickahominy Pipeline is a “public utility” for purposes of the Utility Facilities Act.⁹

Chickahominy Pipeline relies on a declaratory judgment petition involving Xpress Natural Gas, LLC (“XNG”)¹⁰ to support its assertion that the Commission has no jurisdiction to approve the Pipeline.¹¹ This reliance is misplaced. The XNG petition involved the construction, ownership, and operation of a compressed natural gas (“CNG”) fueling station and associated facilities and the provision of CNG service. Importantly, Va. Code § 56-265.1(b) defines public utility to exclude companies delivering natural gas in enclosed portable containers:

Any company which owns or operates facilities in the Commonwealth of Virginia for the . . . production, storage, transmission, or distribution, *otherwise than in enclosed portable containers*, of natural or manufactured gas. . . .¹²

In its Order in the XNG proceeding, the Commission found that:

For the reasons discussed in the Staff Response and based on XNG’s representation that it will not provide service to more than one customer from a single meter or decompression unit and that the service will not be provided through a distribution system, we find

⁸ Petition at 3-4.

⁹ Notably, Va. Code 56-265.1 exempts from the definition of “public utility” any company “generating and distributing electric energy exclusively for its own consumption.” There is no similar exemption for a company distributing natural gas exclusively for its own consumption.

¹⁰ *Petition of Xpress Natural Gas, LLC for a declaratory judgment*, Case No. PUE-2015-00004, Order (Apr. 2, 2015).

¹¹ Petition at 4-5.

¹² Va. Code § 56-265.2(b) (emphasis added).

that XNG's Facility and the decompression units are not made subject to Commission jurisdiction under §§ 56-265. 1 (b) and 265.4:6 of the Code.¹³

In its Response, Staff emphasized that: "XNG plans to deliver CNG in enclosed portable containers, i.e., tube container trucks, not by way of a distribution system. Thus, based on XNG's description of its operations, and construing 'enclosed portable containers' liberally, it seems that XNG falls outside of the definition of 'public utility.'"¹⁴ Staff concluded that:

Based on the Company's assertion that it is not proposing to serve multiple customers from one meter or decompression unit and that it will not be utilizing distribution lines to deliver CNG to its customers, Staff agrees that XNG would not be furnishing non-utility gas service as defined in § 56-265.4:6 of the Code.¹⁵

Staff further noted that:

As proposed, XNG's construction, ownership, and operation of the CNG Facility and the associated connection facilities, does not appear to be subject to Commission regulation. However, if XNG were to serve more than one customer from a single meter or utilize distribution lines to serve its customers in the future, XNG's operations could be subject to Commission regulation.

The XNG proposal is distinguishable from Chickahominy Pipeline's proposal. XNG involved a connecting pipe to draw natural gas from the Transco pipeline, conditioning it to remove excess moisture, compressing it, and loading it onto trailers to transport to customers in Virginia.¹⁶ The connecting pipe was located on land adjacent to the Transco pipeline and did not require piping to be installed on or under any uncontrolled private or public property.¹⁷ Here, Chickahominy Pipeline proposes to construct a 24-inch intrastate pipeline approximately 70

¹³ *Petition of Xpress Natural Gas, LLC for a declaratory judgment*, Case No. PUE-2015-00004, Order at 6 (Apr. 2, 2015).

¹⁴ XNG Staff Response at 4.

¹⁵ XNG Staff Response at 5.

¹⁶ XNG Petition at 4.

¹⁷ XNG Petition at 3.

miles long following a route that will cross Louisa, Hanover, New Kent, Henrico, and Charles City counties to distribute natural gas to its customer, Chickahominy Power, for the generation of electricity. Unlike XNG, Chickahominy Pipeline will be transporting natural gas through distribution lines.

The Petition further asserts that “[b]ecause Chickahominy will not take ownership of the natural gas, nor will the natural gas be sold after reaching the Facility, the natural gas flowing through the proposed Pipeline is not ‘for sale.’”¹⁸ This argument fails. The natural gas being transported by the Pipeline to the Facility is gas sold by the supplier to Chickahominy Power for heat, light, or power. The delivery of gas through a pipeline to an end use customer is what renders the Pipeline a public utility subject to the Commission’s jurisdiction; a sale of gas by the Pipeline to the Facility is not needed to trigger this definition. The narrow and tortured interpretation advanced by Chickahominy Pipeline is unsupported by the plain language of the Code and would undermine longstanding precedent and policy to protect incumbent utilities’ right to serve customers located within its exclusive service territory and avoid unnecessary duplication of facilities.¹⁹

Chickahominy apparently has decided that it prefers to attempt to build a pipeline of its own to deliver gas to its proposed electric power generation facility instead of contracting with the incumbent gas distribution company for such service. It simply cannot do so under Virginia law, any more than an incumbent electric customer could bypass the franchised utility and string its own distribution lines to provide itself utility service.

¹⁸ Petition at 6.

¹⁹ Contrary to Chickahominy Pipeline’s assertion, the Utility Facilities Act is intended to regulate the construction and operation of facilities used for the intrastate transportation of natural gas. *See* Petition at 6.

B. The Commission may not issue a CPCN to the Pipeline because it would violate VNG's exclusive franchise.

While Va. Code § 56-265.2 governs the construction of utility facilities; §§ 56-265.3 and 56-265.4 govern the authority to own and operate utility facilities.²⁰ A territorial CPCN granted under § 56-265.3 is made exclusive by § 56-265.4. Notably, Va. Code § 56-265.4 states that "the transportation of natural gas by pipeline, *without providing service to end users within the territory*, shall not be considered operating in the territory of another certificate holder."²¹ By inference, the transportation of natural gas by a pipeline that provides service to end users within the territory *is* operating in the territory of another certificate holder. Chickahominy Pipeline proposes to provide natural gas delivery service to Chickahominy Power, an end user in VNG's certificated service territory. Thus, the Pipeline cannot be issued a CPCN to serve the Facility, absent a finding by the Commission that VNG's service is inadequate, after an opportunity for VNG to cure any alleged defect.²²

In addition to the plain and unambiguous language of the Code, long-standing precedent and policy support an application of the Utility Facilities Act that protects VNG's exclusive franchise. The Commission has been a strong supporter of exclusive franchises and has affirmed the significant protection afforded to them under the Code. In enjoining violations by an electric utility of the exclusive franchise of another, the Commission stated that:

We must decide this case in a manner that is consistent with, and effectuates, the policy established by the General Assembly of ensuring and maintaining the integrity of service territories embodied in the Utility Facilities Act We cannot allow the parties to use this device to do indirectly what clearly cannot be done directly. While we do not here adopt any absolute test and will always consider the practical realities of each situation, we intend to

²⁰ *Application of Virginia Natural Gas, Inc. For a certificate of public convenience and necessity to build a pipeline*, Case No. PUE-1986-00065, Final Order (Sep. 9, 1988), 1988 S.C.C. Ann. Rept. 257, 258.

²¹ Va. Code § 56-265.4 (emphasis added).

²² Va. Code § 56-265.4.

ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.²³

In another proceeding, the Commission stated:

As discussed in Prince George, however, we must decide cases involving service territory disputes in a way that is consistent with the significant protection that is afforded to territorial grants by Virginia law. If the situation were reversed, *i.e.*, if KU was serving customers in PVEC's territory, the law would compel a similar finding in favor of PVEC, protecting the integrity of its service territory.²⁴

In accordance with the plain language of the Code, applicable precedent, and long-standing policy, Chickahominy Pipeline cannot obtain a CPCN to provide natural gas delivery service to Chickahominy Power because the Facility is located in VNG's exclusive service territory, and there has been no finding that VNG's service is inadequate.

III. CONCLUSION

Chickahominy Pipeline seeks a declaratory judgment from the Commission that it does not constitute a public utility for purposes of the Utility Facilities Act, and therefore may construct the Pipeline to provide natural gas distribution service to the Facility located in VNG's certificated service territory without Commission approval. Such a finding would be contrary to the plain language of the Utility Facilities Act, prior Commission precedent, and the strong policy underlying this Act. For these reasons, the Commission should issue an order finding that the Pipeline constitutes a "public utility" under the Utility Facilities Act, that the Pipeline is

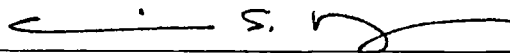
²³ *Petition of Prince George Electric Cooperative For declaratory judgment*, Case No. PUE-1996-00295, Order on Petitions for Declaratory Judgment issued June 25, 1998, 1998 S.C.C. Ann. Rept. 344, 349 (declaring that the Company's service in its territory to customer for use in new plant in coop's adjoining territory, made possible by customer's purchase of 30 foot-wide strip of land for construction of 4,800 foot service line from the plant into the Company's territory, violated coop's exclusive franchise).

²⁴ *Petition of Kentucky Utilities Company For injunctive relief and/or declaratory judgment*, Case No. PUE-1996-00303, Final Order issued March 31, 1999, 1999 S.C.C. Ann. Rept. 368, 376 (declaring that coop's construction of facilities and provision of service in its territory to mining company for use in its operations in adjoining utility's territory already being served by that utility violated the utility's exclusive franchise).

subject to the Commission's jurisdiction and requires a CPCN to be constructed, but that no CPCN can be issued to own and operate the Pipeline to serve an end use customer in VNG's exclusive service territory. VNG remains willing to provide a proposal for service to Chickahominy Power that is feasible, properly recovers the actual costs to serve this customer, and appropriately protects the utility and its other customers.

WHEREFORE, the Company requests the Commission to issue an order (i) declaring that Chickahominy Pipeline constitutes a "public utility" under the Utility Facilities Act; (ii) finding that no CPCN can be issued to Chickahominy Pipeline to construct, own, and operate the Pipeline to serve the Facility because it would violate VNG's exclusive franchise; and (iii) dismissing the Petition.

Respectfully submitted by:
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By: 
Counsel

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October 8, 2021

2110233

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 2021, a true and accurate copy of the foregoing filed in Case No. PUR-2021-00211 was hand delivered, electronically mailed, and/or mailed first class postage pre-paid to the following:

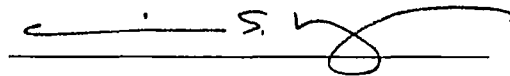
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A handwritten signature in dark ink, appearing to be "S. W.", is written over a horizontal line.